[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

August 26, 1937.

REX v. CHHOA MUI SAI.

[CRIMINAL APPEAL FROM DISTRICT COURT

No. 41 of 1937]

Admissibility of Evidence—Question which may be put in cross-examination of witness.

In cross-examination questions may be asked not only as to relevant facts but also to test a witness' veracity or to shake his credit. The Court however is entitled to disallow any questions as improper if the imputation conveyed in a question is of such a character that the truth of the imputation would not affect or would only affect in a slight degree the credibility of the witness on the matter to which he testifies. The Court should also under s. 152 of the Evidence Ordinance forbid any question which appears to be intended to insult or annoy and which is needlessly offensive in form.

MAGISTRATE'S APPEAL.

Taylour for appellant.

Storr, Crown Counsel for respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case the appellant was charged with cheating one Lee Bek Neo by dishonestly inducing her to deliver cash in various sums.

According to the receipts given by the appellant to the complainant, Exhibits D 1 to 9, the money was paid over to the appellant for the purpose of legal expenses in connection with claims against various persons who owed money to her.

It was argued on the appeal that the fact that the receipts D 1 to 9 had been given by the appellant to the complainant had not been sufficiently proved and that the receipts had not been identified. In my opinion the evidence of the complainant coupled with that of her clerk and of the receipts themselves amply justified the finding of the learned District Judge and this ground of appeal fails.

In the course of the trial evidence was given as to what the complainant said to her lawyers or their clerks and of what they said to her. Practically all this evidence was given in cross-examination. At a subsequent stage of the trial the learned District Judge came to the conclusion that this evidence should have been disallowed in view of s. 126 of the Evidence Ordinance which makes professional communications inadmissible without the client's express consent. This consent was with-held. The learned District Judge accordingly amended the record by excluding all such evidence. The only evidence of the complainant's relation with her solicitor which was let in was the evidence of payment of a sum of $80 to Mr. Mitter.

On the appeal Mr. Taylour's attitude towards the rejection of this evidence was far from clear. He argued that the evidence was wrongly excluded and that he should have been permitted to cross-examine further as to the consultations between the complainant or Ng Ah Tsoa, her clerk, and the complainant's professional advisers. In the alternative he argued that the evidence was inadmissible and that the evidence of the payment of the $80 was equally inadmissible, as being a "communication" made to the solicitor.

It appears to me that the evidence was correctly excluded, nor do I see how the advice tended to the complainant can affect the issue before the Court which is shortly that the appellant received money from the complainant for a certain purpose to which he failed to apply it under circumstances which indicated a dishonest intention.

As regards the payment of the $80 I agree with the learned District Judge that this payment is not a "communication" within the meaning of s. 126 of the Evidence Ordinance. I might also point out that this evidence if wrongly admitted, was certainly in favour of the accused, and in view of s. 448 of the Criminal Procedure Code this ground of appeal would in any case fail.

I do not think that it is necessary to deal at length with the other grounds of appeal. In my opinion there was ample evidence to justify the findings of the learned District Judge.

At the close of the case Mr. Taylour submitted that there was no case. The learned District Judge, rightly as I think, ruled that there was a case to meet. Thereupon Mr. Taylour advised his client to call no evidence, on the ground that the admissibility or non-admissibility of the evidence should first be decided. Unfortunately for the appellant, although he was given the usual opportunity of presenting his defence, he decided to accept his lawyer's advice and called no evidence. Thereupon he was convicted.

According to the notes of evidence Mr. Taylour argued that the important question of the admissibility of certain of the evidence should be decided before the accused was called upon for his defence. It was in fact decided against the appellant by the learned District Judge, and thereupon the accused had to elect whether he would call evidence or not. Mr. Taylour seems to have thought that it was open to him to appeal on the question of the admissibility of evidence, and then, if that point was decided against him, he could proceed with his defence If that was Mr. Taylour's idea, it was based upon a complete misconception. His proper course was to call his evidence, and if the accused were convicted he could argue, as one of his grounds of appeal, that owing to the wrongful admission or rejection of evidence he should never have been

called upon for his defence. An appellate court certainly has a discretion to order a retrial, or to hear further evidence, but the authorities are quite clear that when once an accused person has elected not to give evidence, he will only be permitted to call evidence which was available at the trial under very exceptional circumstances. (*Rex* v. *Watkins*, 1 Cr.A.R. 182 and *Rex* v. *Hatch and others*, 20 Cr.A.R. 181).

The only question therefore is whether in the present case the circumstances are so exceptional that the Court ought to exercise its discretion in the appellant's favour.

On this issue I take the following points into consideration:—

(1) When the charge was brought against the appellant, it was Inspector Balls' duty to investigate it, and in the course of such investigation he took a statement from the accused. Such statement is not admissible in evidence, but it is certain that such statement must have contained the accused's explanation of the manner in which he had expended the $1,536 which he had received from the complainant. Thereupon Inspector Balls quite properly suggested to the accused that it might help him if he could produce witnesses to substantiate his explanation. If these witnesses had given statements in support of the accused's explanation the papers would have been sent up to Crown Counsel in the usual way and if satisfied with the explanation he might have decided not to prosecute. At this point however Mr. Taylour came on the scene and advised his client not to produce his witnesses for examination. In the opinion of the learned District Judge Mr. Taylour did his client a disservice in giving him the advice which he did, and it certainly would appear that the learned District Judge's criticism is justified.

(2) Various defences appear to be foreshadowed in the lengthy cross-examination of the complainant and Ng Ah Tsoa, but as no evidence was called by the accused none of these defences were substantiated.

(3) The accused is a Chinese and possibly did not understand that if he accepted his counsel's advice and called no evidence he would lose the chance of ever putting his case before the Court.

In the peculiar circumstances of this case I think it might be a hardship on the accused if he were precluded from putting up his defence because his counsel misconceived the position.

I direct therefore under s. 311 of the Criminal Procedure Code that the District Judge do take the evidence of the appellant and his witnesses and certify such evidence to this Court. Bail will be extended until the appeal is disposed of.

There is one other matter to which I might refer. The learned District Judge in the course of the trial protested against the prolix cross-examination of the complainant, which lasted nearly eight hours and that of Ng Ah Tsoa. I would point out that under s. 138 of the Evidence Ordinance the cross-examination must be confined to relevant facts, but in addition, under s. 148, as the credibility of a witness is always relevant, questions may be asked in cross-examinations to test a witness' veracity or shake his credit. The Court however is entitled to disallow any questions as improper if the imputation conveyed in a question is of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the credibility of the witness on the matter to which he testifies. The Court should also under s. 152 forbid any question which appears to be intended to insult or annoy, and which is needlessly offensive in form. Bearing these principles in mind, it would appear that in the course of the cross-examination of these witnesses there were many occasions upon which the learned District Judge, instead of protesting, might have exercised his discretion and disallowed certain questions.

Order Accordingly.

Solicitors for the appellant—

Braga & Taylour.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

August 18, 1937.

H. R. L. DYNE

v.

BADARIAH HANIM BINTE ABDULLAH.

[SINGAPORE SUIT No. 82 of 1937]

Limitation Ordinance (Cap. 16)—Contract of guarantee—Article 95.

By a contract a guarantor guaranteed the payment of certain sums within two months from the date thereof, the judgment creditor agreeing to take no steps to enforce his rights under the judgment for two months.

Held, that article 95 was the appropriate article applicable in the schedule to the Limitation Ordinance and that as the appropriate period was 6 years the claim of the judgment creditor against the guarantor was not barred by limitation.

Semble, the meaning of the word "compensation" in the Indian Limitation Act is a meaning which the Courts in British India have given to the word from the construction of that Act itself. As the Limitation Ordinance of the Colony is derived from the Indian Act, the word "compensation" in such ordinance should bear the same meaning as it bears in the Indian Act, especially as it is not a term of art.

TRIAL OF ISSUE.

Smith for plaintiff.

Johannes for defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.